

No. 12-1995 DH

<sup>1</sup> No evidence in the record indicates why this hearing was held by the Department of Social Services rather than the Department of Health and Senior Services.

We held a hearing on May 6, 2013. James M. McCoy represented DHSS. Volk represented herself. This case became ready for our decision on May 28, 2013, which was the last date for the filing of written argument by the parties.

### **Findings of Fact**

#### Volk's Family Child Care Home License

1. DHSS issued Volk a family child care home license for the period from July 25, 2011 through June 30, 2013.

2. The license issued by DHSS permitted Volk to provide care from 6:00 a.m. to 9:00 p.m., five days per week, for up to ten children from the ages of birth through eight years with the following additional restrictions:

- if ten children in care, no more than four children under age two with two adult caregivers;
- if six children in care, no more than three children under age two with one adult caregiver; and
- if seven to ten children in care, no more than two children under age two with one adult caregiver.

3. During the relevant period, Volk provided care for more than four children for compensation at the family child care home in her residence at 2702 Wing Avenue, Sedalia, Missouri.

#### The Variance for Volk's Hot Tub

4. On July 8, 2011, Volk requested a variance for a hot tub at her home.

5. On July 22, 2011, DHSS approved the variance with conditions:

- Hot tub or spa must not be used during child care hours.
- Commercially manufactured hard cover for the hot tub or spa must be in place at all times and secured with an approved locking mechanism that safely restricts children's access to the hot tub or spa.

- Any steps for access to the hot tub or spa must be removed and stored out of children's reach.
- CCFS<sup>2</sup> must monitor and document compliance with these conditions at all inspections to the facility.[<sup>3</sup>]

6. During monitoring visits from DHSS between July 2011 and August 2012, the hot tub was appropriately covered, and the steps were out of reach.

August 8, 2012

7. On August 7, 2012, Volk told parents and children that they would have a "water day" on August 8, with sprinkler play and water guns.

8. On August 8, 2012, Volk was at her home caring for children. Her husband, an approved caregiver, was at home, but asleep in the bedroom. Volk's 14-year-old son and 18-year-old nephew, who were not approved caregivers, were also at the home.

9. The four "older girls" (ages three and four) in Volk's care asked to put their feet in the hot tub. Volk uncovered the hot tub, and she and the older girls sat on the side and put their feet in the hot tub. The hot tub was at a relatively low temperature of about 73 degrees.

10. Child A was one of the older girls. Volk had been told that she had a predisposition to have seizures if she became overheated.

11. Child A's baby sister needed a diaper change. Volk got out of the hot tub and wheeled the baby, in a stroller, to the doorway to change her diaper. She left her son watching at the hot tub. Her nephew was also nearby.

12. Child A fell into the hot tub. Volk's son pulled her out of the water and yelled for Volk. Child A was in the water for a few seconds.

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<sup>2</sup> Nothing in the record explains this acronym.

<sup>3</sup> Pet. Ex. 3.

13. When Child A was pulled out of the water, her eyes were out of focus, she was having a seizure, she was non-responsive, and her lips were starting to turn blue.

14. Volk began performing CPR on Child A., sent her son to wake her husband, and told her nephew to call 911. Volk's husband also called his brother, an EMT.

15. An ambulance arrived and took Child A to the hospital.

16. Child A stayed in the hospital overnight and recovered.

### **Conclusions of Law**

Section 210.221.1(2)<sup>4</sup> gives DHSS the authority to “deny, suspend, place on probation or revoke the license of such persons as fail to obey the provisions of sections 210.201 to 210.245 or the rules and regulations made by the [D]epartment[.]” DHSS filed a complaint with this Commission after Volk requested a hearing to appeal DHSS's immediate suspension and proposed revocation of her license. Section 210.245.2 provides our jurisdiction to hear this case.

DHSS has the burden of proof to establish by a preponderance of the evidence that there is cause to discipline Volk's license. *See Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-230 (Mo. App. W.D. 2012). A preponderance of the evidence is “that which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not.” *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App., W.D. 2000). This burden is met by producing substantial evidence of probative value or by the inferences reasonably drawn from such evidence. *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968).

We must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness. *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App., W.D. 1992). Our findings of fact reflect our determination of the credibility of witnesses.

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<sup>4</sup>Statutory references are to RSMo 2000 unless indicated otherwise

## I. Violations of Statutes and Regulations

DHSS is a state agency created under § 192.005, RSMo Supp. 2012, and vested with the authority to license and regulate child-care facilities under §§ 210.201 through 210.259.

Specifically, the following powers and duties are granted to DHSS under § 210.221.1:

- (1) After inspection, to grant licenses to persons to operate child-care facilities if satisfied as to the good character and intent of the applicant and that such applicant is qualified and equipped to render care or service conducive to the welfare of children, and to renew the same when expired. No license shall be granted for a term exceeding two years. Each license shall specify the kind of child-care services the licensee is authorized to perform, the number of children that can be received or maintained, and their ages and sex;
- (2) To inspect the conditions of the homes and other places in which the applicant operates a child-care facility, inspect their books and records, premises and children being served, examine their officers and agents, deny, suspend, place on probation or revoke the license of such persons as fail to obey the provisions of sections 210.201 to 210.245 or the rules and regulations made by the department of health. The director also may revoke or suspend a license when the licensee fails to renew or surrenders the license;
- (3) To promulgate and issue rules and regulations the department deems necessary or proper in order to establish standards of service and care to be rendered by such licensees to children. . . .; and
- (4) To determine what records shall be kept by such persons and the form thereof, and the methods to be used in keeping such records, and to require reports to be made to the department at regular intervals.

DHSS, therefore, has the power to discipline a licensee, including an expired license, for violating the regulations promulgated by DHSS. The record before us establishes Volk violated several regulations under which she was required to operate.

### A. Access to Unapproved Areas

Regulation 19 CSR 30-61.085<sup>5</sup> provides in part:

(1) General Requirements.

\* \* \*

(E) Children shall have no access to areas not approved for child care.

DHSS alleges that Volk violated the above regulation. We agree. Volk allowed children to access the hot tub, which was clearly out of compliance with the terms of the variance she had been granted. She violated 19 CSR 30-61.085(1)(E).

### B. Failure to Provide Safe Play Area and Premises

Regulation 19 CSR 30-61.085(3)(A) provides:

An outdoor play area shall be available on or adjoining the day care property. The play area shall be located so it is convenient and the children can gain access to it without hazard. It shall be fenced when necessary for the protection of children from traffic, water, or other hazards. . . .

Regulation 19 CSR 30-62.082(1)(A) requires that licensed child care premises “shall be safe and suitable for the care of children.”

DHSS alleges Volk violated the above regulations. We agree that she violated the second, but not the first. Volk provided an outdoor play area that children could access conveniently and without hazard. The fact that the play area contained a hazard on one day does not violate the regulation. On the other hand, 19 CSR 30-62.082(1)(A) provides that the child care premises *shall be* safe. We construe this to mean that they must always be so. On August 8, 2012, the premises were not safe for children. We find that Volk violated 19 CSR 30-62.082(1)(A).

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<sup>5</sup> All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

### C. Good Character and Intent

Regulation 19 CSR 30-62.102(1)(A) provides:

Daycare personnel shall be of good character and intent and shall be qualified to provide care conducive to the welfare of children.

DHSS alleges that Volk violated the above regulation. We disagree.

We interpret “good character and intent” to be at least equivalent with the concept of “good moral character” used in other licensing laws. Good moral character is honesty, fairness, and respect for the law and the rights of others. *Hernandez v. State Bd. of Regis’n for Healing Arts*, 936 S.W.2d 894, 899 n.1 (Mo. App., W.D. 1997).

We determine moral character from the person’s conduct, present reputation, evidence of any rehabilitation, and upon “a consideration and determination of the entire factual congeries.” *State Bd. of Regis’n for the Healing Arts v. Finch*, 514 S.W.2d 608, 614 (Mo. App., K.C.D. 1974). *See also State Bd. of Regis’n for the Healing Arts v. DeVore*, 517 S.W.2d 480, 486 (Mo. App., K.C.D. 1974).

DHSS has demonstrated that Volk violated its safety regulations on one occasion. We do not excuse her behavior, but the circumstances demonstrate no intent to harm children or repeated violations, negligence or inattentiveness. We do not find she lacks good moral character or that she violated 19 CSR 30-61.102(1)(A).

### D. Failure to Comply with Licensing Rules

Regulation 19 CSR 30-61.045(3)(V) provides:

All day care provided on the premises of a licensed family day care home shall be in compliance with the licensing rules and conditions specified on the license.

DHSS alleges that, through her violation of the other regulations, Volk violated the above regulation. As we have found certain violations as discussed herein, we agree that she violated 19 CSR 30-61.045(3)(V).

#### E. Summary of Cause

There is cause to discipline Volk's license for violating 19 CSR 30-61.085(1)(E), 19 CSR 30-62.082(1)(A), and 19 CSR 30-61.045(3)(V).

#### II. Volk's Arguments

At the hearing, Volk admitted that she knew she had made a mistake, but stated that she had never had any other complaints against her license, and she felt her punishment was very harsh. She pointed out that when she left the hot tub, she did not leave the children alone – her 14-year-old son and 18-year-old nephew were there. She also stated that she would never do anything to purposely hurt a child, and that she would be willing to fence or remove the hot tub in the future to regain her license.

We believe Volk, and we consider her professions of good intent to be sincere. However, these are considerations for DHSS in deciding what degree of discipline is appropriate for Volk. Our task is only to determine whether cause to discipline exists, and we have concluded that it does.

#### **Summary**

We find that DHSS has cause to discipline Volk's family child care home license.

SO ORDERED on July 17, 2013.

\s\ Karen A. Winn  
KAREN A. WINN  
Commissioner